

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

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CAROL CALVAGNO, ANTHONY CALVAGNO,  
KENNETH P. SILVERMAN, ESQ, as Chapter  
7 Trustee of Anthony Calvagno and Carol A.  
Calvagno,

Plaintiff,

- against -

DEBORAH BISBAL, JOHN AND JANE DOES  
1-10, MITCHELL SIMS, SCOTT SIMS, TINA  
FELLOWS, TRACY GILLAN, REALTY REPORTS,  
KATHY EISMAN, JOHN AND JANE DOES 1-10,  
JOHN AND JANE DOES 11-20, SOUTHERN STAR  
MORTGAGE COMPANY, GARY SHUSTERHOFF,

Defendants.

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**REPORT AND  
RECOMMENDATION**

CV 06-2020 (ADS) (AKT)

**A. KATHLEEN TOMLINSON, Magistrate Judge:**

On November 13, 2013, this Court issued an Order requesting a status update from the parties since there had been no activity in this case for some time. Electronic Order, Nov. 13, 2013. On November 26, 2013, the Court received a letter from Attorney Mahoney, prior counsel for Plaintiff Kenneth Silverman. *See* DE 314. Mr. Silverman is the former Chapter 7 Bankruptcy Trustee for Plaintiffs Carol and Anthony Calvagno (“the Calvagnos”). Attorney Mahoney represented that, while the estate’s claims against most of the named defendants have been resolved, Mr. Silverman has been unable to resolve the claims asserted by the Calvagnos against defendants Southern Star Mortgage Company, Mitchell Sims, Scott Sims, and Gary Shusterhoff. *Id.* Mr. Silverman has closed the bankruptcy case and has abandoned any remaining claims back to the Calvagnos. *Id.*

In light of Attorney Mahoney's letter, on December 3, 2013, this Court scheduled an Order to Show Cause hearing for December 20, 2013. DE 315. The Order to Show Cause directed that

Carol and Anthony Calvago appear before this Court on December 20, 2013 at 9 a.m. in Courtroom 910, Alfonse D'Amato Federal Courthouse, 100 Federal Plaza, Central Islip, NY 10022, and show cause why this action should not be dismissed based upon the apparent abandonment of any remaining claims in this case.

*Id.* Further, the Order contained the following warning:

Carol and Anthony Calvagno are hereby placed on notice that any failure to appear before this Court on December 20, 2013 at 9 a.m. will result in this Court's recommendation to Judge Arthur D. Spatt that the Calvagnos' case be dismissed with prejudice based on their abandonment of their claims and failure to prosecute those claims.

*Id.* The Court mailed copies of the Order to Show Cause to the Calvagnos by first-class mail and certified mail, return receipt requested. *See id.* The certified mail copies of the Order to Show Cause mailed to the Calvagnos were subsequently returned to the Court as undeliverable. DE 316. The first-class mail copies were not returned.

The Calvagnos failed to appear at the Order to Show Cause hearing on December 20, 2013. On December 26, 2013, the Court issued an Amended Order to Show Cause scheduling a hearing for January 22, 2014. DE 317. The Amended Order to Show Cause stated as follows:

ORDERED, that Carol and Anthony Calvago appear before this Court on January 22, 2014 at 11 a.m. in Courtroom 910, Alfonse D'Amato Federal Courthouse, 100 Federal Plaza, Central Islip, NY 10022, and show cause why this action should not be dismissed based upon the Calvagnos' apparent abandonment of any remaining claims in this case. Carol and Anthony Calvagno are hereby placed on notice that any failure to appear before this Court on January 22, 2014 at 11 a.m. will result in this Court's recommendation to Judge Arthur D. Spatt that the Calvagnos' case be dismissed with prejudice based on their abandonment of their claims and failure to prosecute those claims.

*Id.* The Court mailed copies of the Amended Order to Show Cause to the Calvagnos by first class mail and certified mail, return receipt requested. *See id.* The copies of the Amended Order to Show Cause mailed to the Calvagnos by certified mail were subsequently returned to the Court as undeliverable, just prior to the January 22, 2014 hearing. DE 318. However, copies of the December 20, 2014 Order to Show Cause and the December 26, 2014 Amended Order to Show Cause delivered by first-class mail have never been returned to the Court.

The Calvagnos failed to appear at the hearing on January 24, 2014. *See* DE 319. At the hearing, the Court noted on the record that the Calvagnos have not attempted in any way to communicate with the Court. *See id.* The Court determined that a recommendation would be made to Judge Spatt to dismiss the Court this case, with prejudice. *Id.*

Given all of these circumstances, this Court has no alternative but to recommend to District Judge Spatt that the Calvagnos' case be dismissed based on their failure to comply with this Court's Orders as well as their failure to prosecute their claims. *See* Fed. R. Civ. P. 41(b). Rule 41(b) gives the district court power to dismiss a complaint "for failure to comply with a court order, treating noncompliance as a failure to prosecute." *Simmons v. Abruzzo*, 49 F.3d 83, 87 (2d Cir. 1995). Here, the Calvagnos have a history of non-compliance with the Court's Orders in failing to appear at mandatory Court conferences, failing to communicate in any way with the Court, and failing to prosecute their claims. For these reasons, I respectfully recommend to Judge Spatt that the Calvagnos' Complaint be dismissed.

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72 of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections. *See also* Fed. R. Civ. P. 6(a) and (e). Such objections shall be filed with the Clerk of the Court via ECF.

The Court is also mailing a copy of this Order to the Calvagnos at 359 Old Country Road,  
Deer Park, NY 11729 by first class mail and certified mail, return receipt requested.

**SO ORDERED.**

Dated: Central Islip, New York  
April 11, 2014

/s/ A. Kathleen Tomlinson  
A. KATHLEEN TOMLINSON  
U.S. Magistrate Judge